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**U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

DAN KYES, Individually and For
Others Similarly Situated.

Plaintiffs,

v.

TEREX CORPORATION

Defendant.

Case No.: 2:21-cv-951

**CLASS AND COLLECTIVE
ACTION COMPLAINT**

JURY TRIAL DEMANDED

Plaintiff Dan Kyes (Kyes) is informed and believes, and on that basis alleges, as follows:

SUMMARY

1. Terex Corporation (Terex) failed to pay Kyes, and other workers like him, overtime as required by the Fair Labor Standards Act (FLSA) and the Revised Code of Washington, Chapter 49.46 *et seq.* (RCW), Washington's Minimum Wage Act (WMWA), and any relevant regulations and/or rules adopted by the Washington Director of Labor and Industries (collectively, "Washington Wage Laws").

2. Instead, Terex pays Kyes, and other workers like him, the same hourly rate for all hours worked, including those in excess of 40 in a workweek.

CLASS AND COLLECTIVE ACTION
COMPLAINT - 1 -



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1 3. Terex further failed to pay Kyes, and other workers like him, for all rest
2 breaks, meal breaks in violation of Washington Wage Laws.

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4 4. Kyes brings this collective and class action to recover unpaid overtime
5 and other damages.

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7 **JURISDICTION AND VENUE**

8 5. This Court has original subject matter jurisdiction pursuant to 28
9 U.S.C. § 1331 and 29 U.S.C. § 216(b).

10 6. The Court has federal jurisdiction over this action pursuant to the
11 jurisdictional provisions of the Class Action Fairness Act, 28 U.S.C. § 1332(d). The
12 Court also has supplemental jurisdiction over any state law sub-class pursuant to 28
13 U.S.C. § 1367.

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16 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 a significant
17 portion of the facts giving rise to this lawsuit occurred in this District.

18
19 **THE PARTIES**

20 8. Kyes was an hourly employee of Terex. His written consent is attached
21 as Exhibit A.

22
23 9. Kyes seeks conditional and final certification of this FLSA collective
24 action under 29 U.S.C. § 216(b).

25 10. The class of similarly situated employees sought to be certified as a
26 collective action under the FLSA is defined as:
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28

1 25. Kyes was a Production Supervisor for Terex.

2 26. Kyes worked outside of Seattle, Washington for Terex.

3 27. Terex paid Kyes by the hour.

4 28. Terex paid Kyes \$35 per hour.

5 29. Kyes reported the hours he worked to Terex on a regular basis.

6 30. If Kyes worked fewer than 40 hours in a week, he was only paid only
7
8 for the hours he worked.

9 31. But Kyes regularly worked more than 40 hours in a week.

10 32. Kyes would regularly work 55 to 60 hours in a week.

11 33. The hours Kyes worked are reflected in Terex's records.

12 34. Terex paid Kyes at the same hourly rate for all hours worked up to 40
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14 hours in a workweek.

15 35. After Kyes reached 40 hours, he was not paid for hours worked up to
16
17 46 hours in a workweek.

18 36. Kyes was unpaid for the 6 hours between 40 and 46 hours in a
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20 workweek.

21 37. Once Kyes reached 46 hours he was paid his straight time rate for all
22
23 hours worked in a workweek.

24 38. Rather than receiving time and half as required by the FLSA and
25
26 Washington State Laws, Kyes and the Putative Class Members only received
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28 "straight time" pay for overtime hours worked.

1 48. Any differences in job duties do not detract from the fact that these
2 hourly workers are entitled to overtime pay.

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4 49. Because Terex knew, or showed reckless disregard for whether, its pay
5 practices violated the FLSA, Terex owes these wages for at least the past three years.

6 50. Terex is liable to Kyes and the FLSA Class Members an amount equal
7 to all unpaid overtime wages as liquidated damages.

8
9 51. Kyes and the FLSA Class Members are entitled to recover all
10 reasonable attorneys' fees and costs incurred in this action.

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12 52. The workers impacted by Terex's "straight time for overtime" scheme
13 should be notified of this action and given the chance to join pursuant to 29 U.S.C. §
14 216(b).

15
16 **WASHINGTON WAGE LAW VIOLATIONS**

17 53. Kyes realleges and reincorporates all allegations above as if
18 incorporated herein.

19
20 54. The foregoing conduct, as alleged, violate the Washington Wage Laws.

21 55. At all relevant times, Terex has been, and continue to be, an
22 "employer" within the meaning of the Washington Wage Laws. At all relevant times,
23 Terex employed "employee[s]," including Kyes and the Washington Class, within the
24 meaning of the Washington Wage Laws.
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1 56. RCW §49.52.070 provides that employers who violate Washington's
2 minimum wage laws under the circumstances present in this case are liable for
3 double the amount of wages improperly withheld.
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5 57. Pursuant to RCW §49.52.080, there exists a presumption of willfulness.

6 58. The Washington Wage Laws require an employer, such as Terex to pay
7 overtime compensation to all non-exempt employees. Kyes and the Washington
8 Class are not exempt from overtime pay requirements under the Washington Wage
9 Laws.
10

11 59. More specifically, the Washington Class members' claims are subject to
12 the three-year statute of limitations applicable to the WMWA and implied contracts,
13 as provided under RCW § 4.16.080(3). *See e.g., Seattle Prof'l Eng'g Employees Ass'n v.*
14 *Boeing Co.*, 139 Wash. 2d 824, 838, 991 P.2d 1126, 1134, opinion corrected on denial
15 of reconsideration, 1 P.3d 578 (Wash. 2000); *Mitchell v. PEMCO Mut. Ins. Co.*, 134
16 Wash. App. 723, 737, 142 P.3d 623 (2006).
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20 60. At all relevant times, Terex had a policy and practice of failing and
21 refusing to pay overtime pay to Kyes for his hours worked in excess of forty hours
22 per workweek.
23

24 61. Terex violated Washington Wage Laws including, but not necessarily
25 limited to, RCW, WMWA, by failing to pay the Washington Class on a salary basis.
26

27 62. At all relevant times, Terex did not pay the Washington Class on a
28 salary basis, so the Washington Class was not exempt under Wash. Admin. Code

1 §296-128-510 (executive), Wash. Admin. Code §296-128-520 (administrative), Wash.
2 Admin. Code §296-128-530 (professional), and Wash. Admin. Code §296-128-532
3 (salary basis and deductions).
4

5 63. With regards to the Washington Class Members, Terex did not comply
6 with Washington Admin. Code §296-126-092(4) which provides: “Employees shall
7 be allowed a rest period of not less than ten minutes, on the employer’s time, for
8 each four hours of working time.”
9

10 64. At all relevant times, Terex willfully failed and refused, and continues to
11 willfully fail and refuse, to pay Kyes and the Washington Class Members the
12 amounts owed. Specifically, Terex claws back all hourly advances not paid for
13 rest/meal break time. This conduct violates Washington Wage Laws as alleged in
14 this cause of action.
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17 65. Terex has denied Kyes and the Washington Class wages and benefits of
18 employment, including contractual vacation pay, as alleged herein. Terex’s deduction
19 of Kyes and the Washington Class members vacation pay for wages results in
20 depriving Kyes and Washington Class members of their vacation pay, in violation of
21 RCW §49.52.050. Terex is, therefore, liable to Kyes and the Washington Class for all
22 such vacation pay and other improperly deducted or rebated wages or earnings, and
23 double damages, under RCW §49.52.070.
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27 66. Kyes and the Washington Class seek recovery of attorneys’ fees, costs,
28 and expenses of this action to be paid by Terex.

1 67. Kyes and the Washington Class seek damages in the amount of the
2 respective unpaid wages earned and due at the regular hourly wage rate, and at a rate
3 not less than one and one-half times the regular rate of pay for work performed in
4 excess of forty hours in a workweek; actual damages; penalty damages; and such
5 other legal and equitable relief as the Court deems just and proper.
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8 **CLASS AND COLLECTIVE ACTION ALLEGATIONS**

9 68. Terex's illegal "straight time for overtime" policy extends beyond Kyes.

10 69. Terex's failure to pay for hours worked over 40 extends beyond Kyes.

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12 70. It is the "straight time for overtime" payment plan that violates the
13 FLSA and Washington Wage Laws in this collective and class action.

14
15 71. Terex pays numerous of hourly employees according to the same
16 unlawful scheme.

17 72. Any differences in job duties do not detract from the fact that these
18 hourly workers were entitled to overtime pay.

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20 73. Kyes and the Class Members impacted by Terex's "straight time for
21 overtime" scheme should be notified of this action and given the chance to join
22 pursuant to 29 U.S.C. § 216(b).

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24 74. Terex has accurate records of the wages paid to its hourly workers.

25 75. The Class Members are geographically disbursed, residing, and working
26 in states across the country.
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1 76. Kyes' experiences are typical of the experiences of all Putative Class
2 Members.

3
4 77. Kyes has no interests contrary to, or in conflict with, the Putative Class
5 Members. Like each member of the proposed classes, Kyes has an interest in
6 obtaining the unpaid overtime wages owed under state and/or federal law.

7
8 78. A class and collective action, such as the instant one, is superior to
9 other available means for fair and efficient adjudication of the lawsuit.

10 79. Absent this action, many members of the FLSA Class and Washington
11 Class likely will not obtain redress of their injuries and Terex will retain the proceeds
12 of their violations of the FLSA and Washington Wage Laws.

13
14 80. Furthermore, individual litigation would be unduly burdensome to the
15 judicial system. Concentrating the litigation in one forum will promote judicial
16 economy and parity among the claims of individual members of the classes and
17 provide for judicial consistency.

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19
20 81. The questions of law and facts common to each of the FLSA and
21 Washington Class Members predominate over any questions affecting solely the
22 individual members. Among the common questions of law and fact are:

- 23
24 a. Whether Terex employed the FLSA and Washington
25 Class Members within the meaning of the FLSA and
26 Washington Wage Laws;
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- b. Whether the FLSA and Washington Class Members were exempt from overtime;
- c. Whether Terex's straight time for overtime compensation practice met the salary basis test;
- d. Whether Terex's decision not to pay overtime to the FLSA and Washington Class Members was made in good faith; and
- e. Whether Terex's violation of the FLSA and Washington Wage Laws was willful.

82. Kyes' claims are typical of the FLSA and Washington Class Members since both have sustained damages arising out of Terex's illegal and uniform employment pay policy.

83. Kyes knows of no difficulty that will be encountered in the management of this litigation that would preclude its ability to go forward as a class or collective action.

84. Although the issue of damages may be somewhat individual in character, there is no detracting from the common nucleus of liability facts. Therefore, this issue does not preclude class or collective action treatment.

85. Concentrating the litigation in one forum will promote judicial economy and parity among the claims of individual members of the classes and provide for judicial consistency.

JURY DEMAND

86. Pursuant to F.R.C.P. 38, Kyes demands a trial by jury.

PRAYER

87. WHEREFORE, Kyes prays for relief as follows:

a. An order designating this lawsuit as a collective action and authorizing notice pursuant to 29 U.S.C. § 216(b) to the proposed Class Members to permit them to join this action by filing a written notice of consent;

b. For an Order designating the state law classes as class actions pursuant to Fed. R. Civ. P. 23 under Washington Wage Laws;

c. Judgment against Terex awarding Kyes and the Class Members all unpaid overtime compensation, liquidated damages, attorneys' fees and costs.

d. An award of pre- and post-judgment interest on all amounts awarded at the highest rate allowable by law; and

e. All such other and further relief to which Kyes and the Putative Class Members may show themselves to be justly entitled.

Respectfully submitted,

By: /s/ Nicholas D. Kovarik

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